BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERESSA ARMSTRONG	)	
Claimant	)	
	)	
VS.	)	
	)	
TWIN OAKS HEALTH CARE CENTER	)	
Respondent	)	Docket No. 256,209
	)	
AND	)	
	)	
CONTINENTAL NAT'L AMERICAN GRP.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the December 13, 2004 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on June 7, 2005.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. It is undisputed that claimant's bilateral carpal tunnel syndrome was a natural consequence of her using crutches while recovering from her foot injury.

ISSUES

The Administrative Law Judge (ALJ) found the claimant's accidental injuries arose out of and in the course of employment. The ALJ awarded claimant a 73.66 percent work disability based on a 100 percent wage loss and a 47.33 percent task loss.

The respondent requests review of whether the claimant suffered accidental injury arising out of her employment. Respondent argues that claimant's onset of pain while

walking down a hallway at work was simply the result of a day-to-day activity (walking) and not caused by her work. Consequently, respondent further argues claimant's injury was the result of a personal risk and is not compensable.

If the claim is found compensable, the respondent argues that claimant did not engage in a good faith job search and a wage should be imputed for the wage loss component of the work disability formula. Respondent further argues Dr. Brian Ellefsen's task loss opinion was based upon restrictions that claimant has testified she can exceed and as a result the doctor's opinion should be disregarded. Respondent concludes the claimant's task loss should be based upon an average of Drs. Edward J. Prostic and Philip R. Mills' task loss opinions.

Conversely, claimant argues her work disability should be increased because Dr. Brian K. Ellefsen's task loss opinion was the most persuasive and should be the only opinion used to establish her task loss. Claimant further argues the ALJ's Award should be affirmed in all other respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant was employed as a certified nurse's aide at respondent's nursing home facility in Yates Center, Kansas. Claimant normally worked double shifts, or 16-hour shifts, and her job required her to be constantly on her feet on the facility's concrete floors. In approximately March 2000, claimant noticed that her feet would be tired and sore at the end of a double shift.

On approximately May 10, 2000, after working 10 hours of a 16-hour double shift, claimant heard her right foot pop while walking down the hallway to retrieve a resident's medication from the nurse's station. She experienced immediate pain and noted it felt like she was walking on a knot in her foot. But she continued working and completed her work shift although the pain increased as her foot began swelling.

Claimant was initially referred for treatment and placed on crutches to avoid weight bearing on her right foot. However, after claimant was seen by several physicians the respondent denied claimant further medical treatment. While claimant's request for further medical treatment was litigated she was on crutches for approximately ten months. As a result of using the crutches claimant developed bilateral carpal tunnel syndrome.

On March 27, 2001, Dr. Brian K. Ellefsen performed an excision of the medial sesamoid of the claimant's right great toe. Ultimately, Dr. Ellefsen also performed

additional surgery on claimant consisting of a right carpal tunnel release on March 18, 2003, and a left carpal tunnel release on April 29, 2003.

Dr. Ellefsen, who surgically treated claimant's right foot, removing a fractured bone, opined the stress fracture of the medial sesamoid bone was caused by repetitive trauma from claimant's work activities for respondent. Conversely, Dr. Greg A. Horton opined that claimant's foot injury was not caused by her work.

Dr. Ellefsen wrote in his May 24, 2001 report:

> I wanted to make it clear that I am very familiar with the work requirements of a Nurses Aid[e], having been in private practice nine (9) years and hospital work where I have observed the duties of a Nurses Aid[e] closely, as well as visiting many of the local Nursing Homes, where the Nurses Aid[e]s are doing the majority of the work.
>
> It is my professional medical opinion, with a reasonable degree of medical certainty that Mrs. Teres[s]a Armstrong's job activities, which required her to squat, knee[l] and stoop, resulting in hyperextension of the MP joint which caused a stress fracture of the medial sesamoid bone, over time from repetitive trauma which resulted in the fracture of the medial sesamoid bone, on or about May 10, 2000 which required the treatment she had at the time that she saw us and the surgical intervention which was ultimately the excision of her medial sesamoid bone of her great toe at the level of the MP joint of her right foot.
>
> . . .
>
> . . . Once again, I do not feel it was the walking down the hallway in May of 2000 that caused the medial sesamoid fracture. It was the repetitive micro-trauma resulting in a stress fracture to the medial sesamoid of her right toe that occurred first and the date of May 10, 2000 was simply the date in which this became a fracture of the medial sesamoid which resulted in her pain, causing her to ambulate on crutches and essentially non-weight bearing for a period of nearly one (1) year prior to her surgical intervention.[1]

Dr. Greg A. Horton, who is an orthopedic surgeon with Kansas University Physicians, Inc., believes that it is possible that repetitive activities may have contributed to claimant's fracture but when repetitive activity is a significant contributing factor individuals will typically have pain or inflammation before they experience intense pain. And, according to Dr. Horton, claimant's injury did not follow that pattern. The doctor wrote, in part:

---

[1] Ellefsen Depo., Ex. 2.

> I've taken out fragmented sesamoids from people who has [sic] sustained this as a result of repetitive stress activities. Most recently I've removed a sesamoid from a long distance cross country runner who had a stress fracture as a result of repetitive impact type activities. I've also removed fragmented sesamoids from people who have developed this in the absence of a distinct injurious event. So, in answer to your question, it is indeed possible that repetitive activities may have contributed to this problem. However, it is my experience that when a repetitive type syndrome is a significant contributing problem, patients typically will have symptoms of pain or inflammation that predate the onset of such intense pain. Indeed, all aspects of her ambulation both at and away from the workplace may have contributed to development of this problem.
>
> You've asked whether any particular motion may have caused a predisposition for this problem. Any activity that repetitively loads the sesamoid apparatus could be responsible for this. Running and impact activities can cause such a problem. Persistent squatting could potentially contribute to this. However, she denies any symptoms in her foot prior to this episode of a pop on May 10, 2000.
>
> Again, I think she did have an acute event on this date. It seems from her history and her response to treatment that her sesamoid apparatus was the source of her pain. Dr. Ellefsen has said that the repetitive nature of her job is the cause. Again, I don't see anything specific as far as the circumstance of her employment that would have given her significant predisposition to this. . . .[2]

At her attorney's request, the claimant was examined by Dr. Edward J. Prostic on January 21, 2002. The doctor opined that claimant's right foot injury was caused or contributed to by the work she performed each and every day. The doctor further opined the bilateral carpal tunnel syndrome was caused by the use of crutches while being treated for her foot injury. At the request of respondent's insurance carrier the claimant was examined by Dr. Philip R. Mills on September 8, 2003. Dr. Mills concluded claimant's bilateral carpal tunnel syndrome was caused by her use of crutches while recovering from her foot injury.

The ALJ analyzed the evidence and concluded claimant's right foot injury arose out of and in the course of her employment and her bilateral carpal tunnel syndrome was a natural consequence of that injury. The Board agrees and affirms.

Despite Dr. Horton's opinion, the Board remains persuaded that claimant's foot injury was caused by the repetitive trauma that she sustained during the long hours that she worked for respondent. That conclusion is based upon Drs. Prostic and Ellefsen's opinions, along with claimant's testimony about the inordinately long hours and double shifts that she worked for respondent and that her feet were tired and sore for approximately two months before she experienced the pop in her foot on May 10, 2000.

---

[2] Horton Depo., Ex. 4.

The claimant is entitled to a work disability analysis. Because claimant's injuries comprise an "unscheduled" injury, her permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e(a). That statute provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But this statute must be read in light of *Foulk*[3] and *Copeland*.[4] In *Foulk,* the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

Claimant provided a document that indicated she had inquired about employment at 20 different businesses in Yates Center, Kansas. She contacted half of those businesses by phone and simply inquired if they were hiring. She further testified she had not applied for jobs outside the town of Yates Center and had not contacted state job service to assist her in finding a job.

The claimant was released from medical care in June 2003 and only inquired about employment at 20 businesses in the approximate 10 months before the regular hearing. Claimant limited her job search to Yates Center and indicated that transportation problems prevented an expanded job search. Claimant indicated that she would expand her job

---

[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995)

[4] *Copeland v. Johnson Group, Inc.,* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

search because she had recently obtained a vehicle, nonetheless, she agreed she had not searched for employment in the few weeks since obtaining that vehicle. The Board concludes claimant failed to make a good faith job search.

Accordingly, the Board must impute a post-injury wage for purposes of the wage loss prong of the permanent partial general disability formula. Karen Terrill, a vocational expert, offered the only expert opinion regarding claimant's post-injury wage-earning abilities. Ms. Terrill found claimant capable of earning between $240 and $260 per week based upon the restrictions of the various doctors. The Board agrees and averaging those figures, imputes a post-injury wage of $250 per week. Comparing this to claimant's average gross weekly wage of $318.93, claimant has a 22 percent wage loss.

Drs. Mills, Prostic and Ellefsen all offered opinions regarding claimant's task loss. Dr. Mills reviewed the list of claimant's tasks for the 15 years before the accident which was prepared by vocational expert Karen Terrill and concluded the claimant could no longer perform 8 of 27 tasks for a 30 percent task loss. Dr. Prostic reviewed the task list prepared by Ms. Terrill and concluded the claimant could no longer perform 5 of 27 tasks for a 19 percent task loss. Dr. Ellefsen reviewed the task list prepared by Ms. Terrill and concluded claimant could no longer perform 25 of 27 tasks for a 93 percent task loss. But when explaining the relationship of his restrictions to claimant's task list the doctor noted claimant could only stand for 15 minutes despite claimant's testimony that she can stand for 30 minutes before her foot pain starts to return. The Board finds the opinions of Drs. Mills and Prostic more persuasive and averaging those opinions finds claimant suffers a 25 percent task loss.

Averaging the 25 percent task loss and the 22 percent wage loss, the Board finds claimant has suffered a 23.5 percent permanent partial general disability.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Brad E. Avery dated December 13, 2004, is modified to reflect claimant is entitled to a 23.5 percent permanent partial general disability and affirmed in all other respects.

The claimant is entitled to 65.43 weeks of temporary total disability compensation at the rate of $212.63 per week or $13,912.38 followed by 85.67 weeks of permanent partial disability compensation at the rate of $212.63 per week or $18,216.01 for a 23.5% work disability, making a total award of $32,128.39, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of July 2005.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director